Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

appointment of a receiver had been given, the proceedings were without due process of law. The court held that the appointment of the receiver was but a continuation of the original action, and that hence no new notice was necessary. But even assuming that it was a new action, the court stated that it was not prepared to say that the constitutional requirement of due process was infringed by the appointment of a receiver before notice. *Phelps* v. *Mutual Reserve, etc., Assoc.*, 112 Fed. Rep. 453.

The suggestion of the court is entirely sound, although an early Connecticut *dictum* appears to be *contra*. *Bostwick* v. *Isbell*, 41 Conn. 305. The appointment of a receiver is a purely administrative act for the purpose of enforcing the judgment of the court, and is based upon and confined to the jurisdiction that every sovereign has over property within its territorial limits. The appointment alone is not a deprivation of property, because it is well settled that the receiver himself takes no title but as an officer of the court holds property in the custody of the law. *Keeney* v. *Home Ins. Co.*, 71 N. Y. 396, 401. There is often, to be sure, a certain temporary interference with the beneficial user of property, but temporary restrictions upon the use of property imposed by a court of equity in the exercise of its extraordinary preventive jurisdiction, even though based upon *ex parte* proceedings, have never been considered obnoxious to the Fourteenth Amendment. After judgment rendered, the disposal of the property by the receiver may amount to a deprivation of property, but is no more repugnant to the constitutional requirement of due process than a levy and sale by a sheriff upon execution duly issued. The receiver's sale, like that of the sheriff, passes only the title of the judgment debtor unless the judgment upon which it was based was given in proceedings *in rem*. The property interests of persons not parties to the judgment upon which the receivership proceedings are based remain unaffected by the receiver's disposal of the property. *Dann Mfg. Co.* v. *Parkhurst*, 125 Ind. 317. As the mere appointment of a receiver does not effect a change upon the title to the property, and as his disposal affects only the title of those against whom a valid judgment has been obtained, it follows that the requirement of due process does not preclude the appointment of receivers upon *ex parte* proceedings.

MARTIAL LAW. — About thirty-five years ago the subject of martial law was carefully considered in England as a result of Governor Eyre's acts in suppressing the Jamaica Rebellion. It was likewise considered in the United States at the same time, owing to the conduct of military commanders during the Civil War. The position taken by Lord Chief Justice Cockburn in his charge to the Grand Jury in the case of *Regina* v. *Nelson and Brand*, and that taken by the majority of the Supreme Court of the United States in *Ex parte Milligan*, 4 Wall. 2, were substantially the same. The rule laid down was, broadly, that no civilian could be tried by martial law, where the civil courts were sitting and in actual exercise of their ordinary functions. Considerable authority was cited to sustain this view. Since then, until very recently, the courts of the two countries have not had occasion to discuss the subject. The war in South Africa, however, brought the question once more before the courts of England. The Judicial Committee of the Privy Council in dismissing a petition for special leave to appeal from the order of the

Supreme Court of Cape Colony, which had denied the petitioner's right to summary release from military custody, held that the absence of visible disorder, and the continued sitting of the courts, did not preclude the existence of martial law. *In re D. F. Marais*, [1902] A. C. 109.

Unfortunately the term martial law is used in several senses. It is applied commonly to what may otherwise be termed military law — the law governing the naval and military forces; it is applied to the jurisdiction exercised by military commanders over invaded or conquered territory under military occupation; and it is further applied to the jurisdiction exercised by the executive over all persons during a state of war, in domestic territory. The first two applications of the term may be dismissed from consideration; for the one is settled everywhere by statute, and the other by the rules of international law. The scope of martial jurisdiction in the last sense cannot be positively defined in the present state of the authorities. This last adjudication on the subject shows the change judicial opinion has undergone in England. It seems undisputed, however, that in time of war, or when a military commander believes *bona fide* and reasonably that there is imminent danger, private property may be seized for the benefit of the state; and the fact of war or the imminence thereof will be in itself a justification of what would otherwise be a trespass. Y. B. 21 Hen. VII. 27, pl. 5; *British Cast Plate Manufacturers* v. *Meredith*, 4 T. R. 794, 797; *Mitchell* v. *Harmony*, 13 How. (U. S. Sup. Ct.) 115.

On principle it would seem that the same rule should apply to infringement of the rights of personal liberty. See *Ex parte Milligan*, *supra*. Though the courts recognize the identity in principle they differ in opinion as to what is war, when rights of personal liberty are involved. The Supreme Court of the United States has said that the continued sitting of the ordinary courts, and the absence of visible disorder, absolutely preclude a lawful exercise of martial law. The Judicial Committee of the Privy Council takes an opposite view. It is submitted that the latter view is preferable. Under modern conditions it cannot truly be said that the absence of visible disorder shows there is no necessity for martial law. The continued sitting of courts is too artificial a test to be serviceable. Martial law is the law of necessity. The executive must be left unhampered in time of war to deal with problems summarily and to take protective measures without waiting for the machinery of the courts. This view was advanced by Chief Justice Finch as long ago as the famous *Case of Ship-Money*, 3 S. T. 826, 1234. It may be urged that this view gives too great power to the executive, and that it is likely to be abused. The reply would be that it is equally improbable that the ordinary executive would disregard the powerful restraints of public opinion. To carry on a war effectively, the executive must have power; and reliance must be placed on the ability of the people to restrain him in the use of it. Under the Constitution of the United States, there is no method by which the guaranties of the Bill of Rights can be suspended. The legal justification of martial law must rest on the theory that the doctrine *salus populi lex suprema* is understood as an implied modification of the Bill of Rights. Under Continental constitutions, it should be noted, provision is made whereby the executive on authorization of the legislature may suspend the constitutional guaranties, proclaim a state of siege, and submit all persons to military jurisdiction. See THE CONSTITUTION OF SPAIN (1876). Arts. 4; 5; 6; 9; 13, §§ 1, 2, 3; 17.